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ABSTRACT

This paper examines the implications of the 1972 Title IX Education Amendments and the 1997 U.S. Supreme Court Cohen v Brown University decision on gender equity in athletics in higher education. It argues against the widely held belief in higher education that in the process of implementing social reforms such as Title IX, which broadly prohibits discrimination on the basis of sex under any education program or activity receiving federal financial assistance, "the law" operates as an irrevocable barrier between what is wanted or desirable and what reason dictates is possible. The paper maintains that the current Title IX doctrine bears a closer resemblance to the broad policy ambitions of the women's movement prior to the statute's enactment than to their legal expression in the statute, and that the decision making underlying the result has been at least as entrepreneurial as it has been dutiful to the mandate and its legislative history. It is concluded that from a highly confined expression of nondiscrimination policy, Title IX policy currently embraces programs as economically insular as athletics, and is arguably less concerned with rectifying the discriminatory conduct of colleges and universities than societal attitudes about female participation in sport. (Contains 50 references.) (MDM)

# *Cohen v. Brown University* and the Acceleration of Gender-Equity In Higher Education

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# *Cohen v. Brown University* and the Acceleration of Gender-Equity In Higher Education

by Robert R. Hunt[1]

## Introduction

While somewhat unspectacular, the 1997 finale of the seemingly boundless litigation in *Cohen v. Brown University* (1997) has certainly given colleges and universities greater reason to reflect upon their efforts to scale an NCAA championship or to simply educate the "whole person" by encouraging participation in intercollegiate athletics. The series of decisions in that case, concluding with the Supreme Court's rejection of Brown's petition for certiorari, leaves us with at least the temporary sanction of Title IX athletic policy which virtually mandates that institutions maintain proportionately equal participation by men and women.

This conclusion, briefly, is premised on the assertion that the three-part analysis upheld in *Cohen* for determining whether an institution's athletic programs "effectively accommodate the interests and abilities" of men and women, can only be satisfied by achieving the statistical relationship between participation and enrollment ("substantial proportionality") which courts have acknowledged as a "safe harbor" from legal challenge (OCR Policy Interpretation, 1979). In most instances this means that prior to a specific finding of discrimination, in order to comply, institutions must extend greater opportunities to women through a procedure of preferential program expansion, while denying opportunities to a certain percentage of men.

This result is important in a couple of related respects. First, although the use of similarly "remedial" gender classifications has been sanctioned under constitutional equal protection analysis (e.g.; the use of separate men's and women's teams) they have normally been premised on specific findings that the institutions involved had in fact discriminated.[2] Following *Cohen*, by contrast, a deviation from the proportionality standard raises an inference of discrimination which an institution must rebut to avoid a determination of noncompliance, by demonstrating that it has either continuously expanded athletic programs for women, or has met the athletic interests of every woman (but not every man) on campus.

Second, because each of these alternative tests take proportionality as their logical end and therefore reinforce the necessity of statistical balancing, the entire effective accommodation analysis can be characterized as "an affirmative action, quota-based scheme" which dispenses with the question of accountability, or the causal connection between an institution's practices and the alleged discrimination (*Cohen IV*, 1996, dissent of C.J. Torruella). The import of these distinctions is that under the current formulation of Title IX requirements, institutions are shouldered with responsibility for the effects of historical, social, and cultural influences on female interest in athletic participation–factors largely beyond the control of colleges and universities and, arguably, an inappropriate basis for Title IX liability.

Title IX and its legislative history, in fact, explicitly discourage such an interpretation (*see* Hearings on Title IX Regulations, 1975, p. 555). Section 1681(b) of the statute, in particular, provides that:

> Nothing contained in ... this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity in comparison with the total number or percentage of persons of that sex in any community, state, section or other area. (20 U.S.C. §1681(b))

This provision, according to the legislative record, was inserted to prevent interpretations of the statute creating a Title IX "entitlement", or a guarantee of "equal result" rather than equal opportunity (Cong. Rec., 1972). By affirming the use of preferences to address statistical disparities in athletic participation which may reflect genuine differences in interest rather than discrimination, in short, *Cohen* can be viewed as an endorsement of much broader view of Title IX than the statute's terms and legislative history may warrant.

Admittedly, the forgoing description of *Cohen* and its implications involves many complex issues that are not only difficult to summarize, but challenge one's sense of propriety in matters of both law and public policy. For these reason and others, it is not my ambition to show that current approach is "wrong". Indeed, as a left-leaning observer of Title IX there is little about *Cohen* which I dislike; by staking-out a clear standard for Title IX compliance, institutions and the NCAA will be forced, after years of dilatory maneuvering and defiant neglect, to make difficult choices.

As a lawyer reared in the positivist tradition, on the other hand, I am somewhat uncomfortable with a regulatory framework which is perhaps most aptly described as "greater than the sum of its parts". The purpose of this paper, accordingly, is not to debunk *Cohen* but the belief widely held in higher education and legal circles alike that in the process of implementing social reforms like Title IX, "the law" operates as an irrevocable barrier between what I want and what reason tells me I can have. In support of this proposition, I will attempt to demonstrate that the current Title IX doctrine bears a closer resemblance to the broad policy ambitions of the women's movement prior to the statute's enactment than to their legal expression in the statute, and that the decisionmaking underlying this result has been at least as entrepreneurial as it has been dutiful to the mandate and its legislative history.

The conceptual framework selected for this undertaking (described below), focuses on the nature of the legal process of administering or implementing "socio-legal" mandates like Title IX and includes discussions of the pressures brought to bear on the legal system when it assumes responsibility for politically charged social initiatives, and when asked to resolve disputes involving significant issues of public policy.

## Conceptual Framework

The implementation of public policy initiatives like Title IX is a topic which has received considerable attention in the last 25 years. Beginning with Pressman and Wildavsky's seminal study *Implementation: How Great Expectations in Washington are Dashed in Oakland* (1973), theory and research in this developing area has examined a host of variables, including resource, organizational and political requirements.

Currently, however, it is widely acknowledged that implementation simply involves too many variables to persist in the belief that lawmakers can unilaterally design policies that are either socially or politically realistic (Goggin, Bowman, Lester, & O'Toole, 1990). "The day is long gone," as Professor Yudof observed, "when lawyers and social scientists [can] assume that Court decisions and legislative and administrative rules automatically are translated into the desired action" (Yudof, 1981, p. 443).

While explanations of this breakdown between "command and compliance" abound, comparatively little has been said about the role of law and the legal system in the implementation equation. An exception is William Clune, a scholar of law and education who, in the early 1980's, recognized implementation as a process of "creating or attempting social change through law", and widely ruminated on the consequences of the use of law for "social engineering" (Clune, 1983, p. 51). In a system traditionally characterized by the rigorous observation of legal standards and process to structure decisions, Clune is interested in what occurs when that conventional legal rationality collides with politically-charged social interventions like Title IX.

Two related effects are discussed at length. The first is the inability of conventional rationality to adequately comprehend or resolve what are essentially public policy conflicts. The second involves the infusion of public policy discourse into the interpretation and enforcement of rights which, unlike those in the private sector, "depend dramatically on the state rather than freedom from the state" (Clune 1983, pp. 102-103). The legal system's responsibility for the maintenance of the modern "regulatory-welfare-state" where issues of law and public policy are often inextricable, Clune maintains, has precipitated a shift from a rigid "rule-orientation" to a more "reflexive rationality" emphasizing a greater responsiveness to input arising from the regulated context in order to effectuate the substantive social objectives of Congress (Clune, 1983, Teubner, 1983). Courts and bureaucrats, in other words, are seen more readily engaged in activities ordinarily regarded as the exclusive domain of the political branch of government such as evaluating competing social interests and the effects of policy (Clune, 1983; McDougall, 1989).

Precipitating this "politicization" of public law, Clune argues, are the shortcomings of the political process itself. To negotiate that process, for example, lawmakers resort to statutory language evading difficult, embedded issues. Compounding this imprecision is the type of uncertainty summarized in the axiomatic observation that whatever knowledge is available to legislators about the social problem they wish to address, or the effects of policy on the problem, is typically deficient. The result is the generation of socio-legal mandates (or laws transmitting social policy objectives) which, though momentarily satisfactory, are nevertheless unrealistic.

Because common implementation chores like the interpretation, application and enforcement of these directives provide a multitude of opportunities to alter the "political balance" (or the way in which competing demands were originally compromised by legislators), moreover, efforts may be mounted to either narrow or expand the law's sphere of influence. Arguments that some aspect of a program imposes an unreasonable hardship, for example, may materialize in the form of a lawsuit seeking to annul a regulation or guideline, and political channels may be manipulated to procure favorable treatment from an agency or to obtain an amendment.

These activities, naturally, tend to elicit similar reactions from those with conflicting interests

and ideologies. For this reason the post-legislative process is described as "interactive" one, where "[a]ny given legal or political action may be met with a reaction by the organizations affected" (Clune 1983, p.56).

> Thus, a bill or a judicial decree introduced to enforce civil rights may be met with legislative initiatives designed to dilute or reinforce it. Regulations enacted under legislation may be met with political resistance and the regulations may be revoked. Enforcement measures such as threatened sanctions may be greeted with political backlash designed to produce a withdrawal of the threat, or with various organizational adaptations ... In a lawsuit, these efforts take the form of attempts to modify the decree or to obtain various remedial orders. In administrative practice, lobbying to strengthen or to weaken the underlying statute, administrative regulations, and practical administrative sanctions are common. (Clune 1983, p.56-57)

In a process bearing a resemblance to a military campaign, in other words, competing demands are constantly reasserted in the hope that the objectives reflected in statutes and regulations will be modified. "When policy does grow in an orderly fashion", Clune asserts, "it is because struggles were resolved at a multitude of critical junctures in a manner at least reasonably consistent with the underlying purpose of the law" (Clune, 1983, pp. 57-58).

At the heart of Clune's "political model of implementation", therefore, is the proposition that political struggles over policy goals do not necessarily expire with the legislative process, but are exported to implementation where discretion is considerably decentralized and where the decisionmaking process can often be set in motion by interested parties. This accessibility, it is asserted, operates as a virtual assurance that organizations will confront one another in "legalized sectors of public policy", and that the progression from specified policy goals to specified outcomes will rarely be logical or tranquil (Clune, 1983, p. 99). Rather, struggle, conflict and compromise among contending interest groups will ensure that policy goals and their associated "costs" are continuously revisited with the accompanying potential that the political balance of the program will be constantly revised (Clune 1983, p.53).

While campaigns aimed at limiting a statutes' effects are natural extensions of the political process (e.g.; the Tower Amendment, introduced in 1975 to exempt athletic programs from Title IX coverage), however, efforts to persuade non-elected officials or a decisionmaker's own bias towards the goals of the program pose unique challenges for the legal system. In those instances, politics (used here to refer to policy preferences, whatever their origin) tend to collide with the expectations that decisions will be structured around unassailable rules and standards, and that some record of that reasoning will be provided.

Clune's assertions about the nature of implementation and public law, to summarize, stand in marked contrast to more conventional theories and popular conceptions holding that implementation is (or should be) merely a "ministerial" process in which political determinations of policy are faithfully carried out, as well as jurisprudential theory holding that the law and the legal system are (or should be) insulated from social and political influence. While acknowledging that the rational application of legal rules continues to exert a great deal of influence on legal outcomes, he also believes that the real and perceived effect of substantive social reforms makes implementation an inescapably political undertaking.

In addition to this conceptual framework for understanding decisionmaking in implementation, Clune's model supplies a great deal of practical guidance for those interested in examining the modification of a program like Title IX. Because socio-legal mandates are described as "overture[s] to a complex process of compromise and adjustment," in particular, it is suggested that an understanding of that political compromise, in terms history and implicit policy conflicts, will assist the exploration of later modifications which are held to "proceed from the same source" (Clune, 1983, p.83, 59).

Initially therefore, the following discussion focuses on Title IX's history and structure. After an examination of several significant modifications of the program's legal structure and the issues which connect them, a few summary observations are made about Title IX implementation and its relationship to the legal system.

## Title IX Formation

The overarching aim of the women's groups which coalesced in the early 1970's into the "second women's movement", observers seem to agree, was to reform federal policy regarding sex discrimination (Sachs & Wilson, 1979). Although a variety of motives have been implicated, there are many indications that the economic plight of women in the late 1960's and early 70's provided the impetus and direction for these efforts.[3] Salomone (1986), for example, observes that at that moment in history an educated generation of "baby boom" women entered the work force "only to face a world of limited employment opportunities and a persistent gap in earnings between the sexes" (p. 113).

To address those conditions, it is asserted, activists exploited the "full range of political tactics" at their disposal to secure protections similar to those afforded to racial and ethnic minorities. (Costain & Costain, 1992) Lawsuits were initiated to pressure the federal courts to elevate the level of protection afforded to women under constitutional equal protection analysis[4], and a political campaign was mounted to secure approval of the Equal Rights Amendment (ERA)[5], a constitutional measure designed to prohibit all but the most compelling gender classifications in laws and policies regulating among other things, marriage, guardianship, dependents, property ownership, independent business ownership, dower rights, and attendance at state universities. (Report of the Presidential Task Force on Women's Rights and Responsibilities, 1970)

The legislative effort from which Title IX emerged, in other words, was but one aspect of a three-part strategy to produce a "single, coherent theory of women's equality before the law", and the component which sought to build on the recent successes of the civil rights movement. (Brown et al., 1971, p. 883). As a complementary political objective advancing a rigorous "no-exceptions" policy, accordingly, the ERA provides the clearest expression of the policy goals which prompted Representative Edith Green in 1970 to introduce an amendment to Title VI of the Civil Rights Act (1964) to prohibit sex discrimination without exception, in all federally assisted programs. Although Title VII of the Civil Rights Act already provided some workplace protections to women, Title VI controls access to many of the more indirect means of economic productivity including education and job training.

The Title VI amendment, however, was opposed as being so broad as to engender an "undesirable" level of equality between the sexes since that statute governed many programs in which sex was informally regarded as a *bona fide* basis for differential treatment and further, would endanger such cherished traditions such as single-sex schools (House Hearing Report, 1970).[6] Green responded in 1971 by offering a independent provision limited to prohibiting sex discrimination in federally assisted *educational* programs and activities, with express exemptions for single-sex, military and religious institutions (House Hearing Report, 1970).

In slightly altered form, this provision proved to be the sole success of the movement's three-part strategy, but only distantly reflected the goal exhibited in the ERA of eradicating sex discrimination on the broadest possible scale. The basis of that shortcoming (as well as the failure of the ERA, and the continued resistance of the judiciary to elevating the level of protection under equal protection analysis), simply put, was an unwillingness on the part of lawmakers to treat sex discrimination like race discrimination.

Nowhere was this diffidence in greater evidence than in the effort to exempt college and university admissions policies from Title IX coverage (Cong Rec., 1971). In that debate, republican lawmakers in the House of Representatives asserted that the imposition of federal control over admissions would "plant the seed of destruction for our system of higher education as we know it" (Cong. Rec., 1971, p. 39,249).

> Enactment of Title [IX] would [] significantly weaken one of the great strengths of the American system of higher education–diversity. Diversity in the types of educational institutions affords more freedom to students, allowing each the opportunity to select the type of educational environment best suited to their individual needs, and encourages colleges to experiment and develop innovative programs. *The imposition of a monolithic unity by federal statute would serve only to homogenize campuses*, a condition repugnant to the very nature of higher education in this country and contrary to the best interests of the future generations of college students (Cong. Rec., 1971, p. 39,249, remarks of Rep. Erlenborn, emphasis added).

Although the proposed legislation sought only to eliminate the consideration of an applicant's sex in the admissions process rather than require institutions to equalize numbers of male and female students, the rhetoric was proportionately enlarged to highlight where that minute erosion of institutional autonomy and academic freedom might lead.

> Mr. Chairman, I offer this amendment to preserve the swiftly eroding rights of colleges and universities of America. We must view Title [IX] for what it plainly is, just one more giant step toward involvement by the Federal Government in the internal affairs of institutions of higher education. The constant danger is that all too often federal involvement in the internal affairs of institutions is but the first step toward ultimate Federal control (Cong. Rec., 1971; 39,248).

Without the prompting of a significant change in constitutional law (e.g.; ratification of the ERA), in short, congressional opponents of Title IX saw little reason to abandon their tradition of not interfering in college and university affairs, or to marginalize the academic freedoms acknowledged by the Supreme Court in *Sweezy v. New Hampshire* (1957) to include the "ability of the institution to determine for itself, on academic grounds ... *who may be admitted*."

Among the rejoinders to those arguments was the assertion that federal intervention in higher education for the purpose of preventing discrimination was not an issue of "first impression"; that Congress had enacted Title VI of the Civil Rights Act nearly a decade earlier to prohibit colleges and universities from discriminating on the basis of race or nationality (Cong. Rec., 1971, p. 39,252). That reminder, however, failed to deter a majority of lawmakers from acting upon their conviction that, unlike race discrimination, sex discrimination is not an absolute evil; that in certain circumstances the ability to differentiate treatment on the basis of sex satisfied the needs of society and its institutions.[7]

## Developments in Athletic Policy

### Title IX Coverage

> "No person in the United States shall, on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance" (P. L. 92-318 codified at 20 U.S.C. §1681 et seq.,)

As with most statutory directives, the transition from the spare language of Title IX to a set of comprehensive regulations dealing with a variety of educational programs and activities involved a great deal of interpretation, a task which Congress delegated to the Department of Health, Education and Welfare (DHEW). The publication of DHEW's draft regulations revealed that in the absence of more explicit direction from Congress, and a shortage of case law dealing with sex discrimination in education, it had taken the liberty to give the statute a very broad interpretation, substantially expanding its coverage and the agency's powers of enforcement.

In a move which astonished many observers, for example, DHEW abrogated perhaps the most significant of Title IX's limitations; extending coverage from programs "receiving federal financial assistance" to those presumed by institutional proximity to indirectly benefit from that assistance, and by defining "assistance" to include the indirect receipt of federal student financial aid (Fed. Reg., 1974). By extending coverage to virtually every aspect of an institution's operations in this manner, the agency transformed the standard of Title IX jurisdiction from a narrow "program-specific" standard into much broader "institutional" standard.[8]

Importantly, however, that modification of policy was not only grounded on the slimmest of precedents but involved a studious disregard of contradictory evidence and authority (BYU L. R., 1976, Kuhn, 1976).[9] In support of its "benefit theory" of coverage, for example, DHEW relied exclusively on *Board of Public Instruction of v. Finch* (1969), a case arising under Title VI in which the Fifth Circuit remarked in dicta that virtually all programs within an institution benefit from federal assistance insofar as the introduction of federal monies "releases" institutional funds for other uses. What the agency overlooked or failed to mention, however, was that the court went on to hold that DHEW could not seek to affect compliance by terminating funds without first demonstrating that the program in direct receipt of those funds was itself discriminatory (*Finch*, 1969). Absent the power to enforce compliance in "benefitting" programs, logically, an extension of coverage to those programs would be meaningless.

Once exposed to searching legal scrutiny, accordingly, DHEW's house of cards quickly folded. In *North Haven Board of Education v. Bell* (1982) and *Grove City College v. Bell* (1984) specifically, the Supreme Court invalidated DHEW's benefit theory and returned Title IX coverage to the program-specific standard suggested by a more literal reading of the statute. Because the agency had exported its institutional interpretation of coverage to several other equity programs in the intervening decade, however, *Grove City* had much broader implications. For this reason, activists from wide array of civil rights organizations were able to band together to persuade Congress to overrule *Grove City* by amending the definition of "program or activity" in each of those statutes to include institutions (Civil Rights Restoration Act, 1987).

Regulation of Athletic Programs

With the exception of the four-year period following *Grove City,* DHEW's definition of Title IX coverage has had profound consequences for athletic programs which critics have regularly asserted neither receive direct federal assistance nor are "educational" within the meaning of the statute (Hearings on Title IX Regulations, 1975 p.520). Guided by its institutional theory of coverage, however, the agency naturally regarded extracurricular programs including athletics as falling within Title IX coverage and took the additional step of promulgating specific regulations (Fed. Reg., 1974).

The regulation of athletic programs, however, provoked a vigorous response in Congress. Amendments, like the one sponsored by Senator John Tower, for example, were introduced to exempt athletic programs either in whole or part; the fear being that a mandated expansion of women's programs would divert resources from more visible and lucrative men's programs (Cong. Rec., 1975, p. 22,778). The measure finally approved, the "Javits Amendment," (1974) directed DHEW to make "reasonable provisions considering the nature of particular sports"–a half-hearted attempt to exempt "revenue-producing" sports programs which unwittingly succeeded in shoring-up DHEW's basis for extending coverage to athletic programs in the first place. Congress, DHEW Secretary Caspar Weinberger reasoned, would not have imposed a "reasonableness" standard unless it considered athletic programs to be covered by the statute (Hearings on Title IX Regulations, 1975, p. 438).

Intercollegiate athletic programs, however, differ from other educational programs in ways which make them difficult targets of gender-based reform, including dangerous bodily contact in certain sports and an expectation of economic self-sufficiency at the departmental level.[10] For this reason, perhaps, DHEW's proposed regulations sought to simply equalize participation by requiring institutions to undertake "affirmative efforts" in the form of additional training, support, and publicity to enable women to participate in greater numbers, and to then provide "athletic opportunities in such sports and through such teams as will most effectively equalize opportunities for members of both sexes ..." (Fed. Reg., 1974, p. 22,230).

While "ease of administration" certainly recommends such an approach, requiring institutions to develop female interest in athletic participation also subtly shifts accountability from factors within the control of institutions (i.e.; number and level of programs) to social factors largely beyond their control. From the 9700 comments, suggestions, and objections elicited by these

proposed requirements, accordingly, a decisive criticism emerged; by requiring institutions to take steps to increase female participation *prior* to any finding of discrimination by the institution, the requirements confused the concepts of "equal opportunity" and "affirmative action".

Ultimately those criticisms and the clarity of the statute's injunction against the use of preferential treatment to correct statistical imbalances (§1681(b)) forced DHEW to not only withdraw the requirements, but admit that they were inconsistent with the mandate. The agency's "final regulations" (1975), moreover, assess "equal opportunity" in athletic programming by reference to the accommodation of *existing* student interest, whether or not the results are statistically equivalent (Fed. Reg., 1975).

Of equal or greater importance, however, is the fact that under the regulations the accommodation inquiry is relegated to the status of one of a host of factors referred to by DHEW in a determination of compliance. In assessing compliance, specifically, the regulations state that the agency will consider "among other factors":

> (a) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of the members of both sexes (b) the provision of equipment and supplies; (c) scheduling of games and practice times; (d) travel and per diem expenses; (e) opportunity to receive coaching and academic tutoring; (f) assignment and compensation of coaches and tutors; (g) provision of locker rooms, practice and competitive facilities; (h) provision of medical and training facilities and services; (i) provision of housing and dining facilities and services; and (j) publicity (Fed. Reg., 1975, p. 24,134).

An important consequence of assessing compliance by means other than exclusive reference to the accommodation of student interest, is that institutions retain control over many aspects of programming which effect not just students, but the interests of the institution in maintaining athletic programs such as visibility and prestige.[11]

Following Congress' reluctant approval of the regulations[12], 1978 and 1979 produced major developments in enforcement policy of which the same Congress would almost certainly have disapproved. The first, the Policy Interpretation of Title IX and Intercollegiate Athletics ("Policy Interpretation,"1979) issued by the Department of Education's Office for Civil Right ("OCR" assumed responsibility for Title IX following the dissolution of DHEW) to clarify the regulations, renewed the emphasis on equalizing participation (Fed. Reg., 1979).

In that document OCR separates the ten equal opportunity factors specified in the regulations into three "major areas" or tests of compliance: equitable distribution of athletic scholarships, "equivalence in other athletic benefits and opportunities" (e.g., travel and equipment), and "effective accommodation of student interests and abilities" (Fed. Reg., 1979, pp. 71,415-417). The relevance of this change is readily apparent: effective accommodation is elevated from a one-in-ten consideration under the regulations, to a one-in-three consideration. Further, because the agency failed to clarify whether the tests must be applied together for the purposes of establishing compliance or may be applied independently, effective accommodation can be understood as a "complete compliance section on its own" (Shook, 1996, p. 797; see also *Cohen II*, 1993).

The "three-pronged" method chosen by OCR to effectuate the effective accommodation standard requires institutions to alternatively demonstrate that the rate of female participation in

athletic programs is approximately proportionate to their rate of undergraduate enrollment, that they have a history and maintained a "continuing practice" of program development for women, or by producing evidence that the existing program "fully and effectively" accommodates the interests and abilities of both sexes (Fed. Reg., 1979). In most instances, OCR stated, meeting the effective accommodation requirement "will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels," a result which it attempted to justify by reference to "the discriminatory effects of the historic emphasis on men's intercollegiate sports," and the "nationally increasing levels of women's interests and abilities " (Fed. Reg., 1979, p. 74,414-419).[13]

The second event alluded to earlier involved a ruling of the Supreme Court making athletic programs much more vulnerable to challenge. In *Cannon v. University of Chicago* (1979) the Court enabled individuals with complaints arising under Title IX to circumvent time-consuming administrative procedures by implying a private right of action–a move which precipitated a flood of new litigation and essentially gave the courts primary responsibility for Title IX enforcement.

Utilizing a four-part analysis developed four years earlier in *Cort v. Ash* (1975), the Court determined that the purposes of Title IX, the legal context in which it was enacted, and the inadequacy of the statute's funding termination remedy for redressing individual harm, all suggested that in spite of its silence on the issue, Congress had contemplated enforcement by private litigants. Justice Stevens, who authored the majority opinion, was particularly attentive to the fact that "in 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy" in (*Cannon*, 1979, pp. 697-698).[14] "It is always appropriate," he reasoned in imputing an awareness of those developments to the Congress "to assume that our elected representatives, like other citizens, know the law ..." (*Cannon*, 1979, pp. 697-98).

Equally persuasive in the Court's view, was the onerous burden of proof imposed on individuals to trigger the statutory remedy. "[I]t makes little sense", the Court reasoned, "to impose on an individual, whose only interest is in obtaining a benefit for herself ... the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate" (*Cannon*, 1979, p. 705). In such situations, it was asserted, violations would be more efficiently remedied by a court ordered injunction, "requiring an institution to accept an applicant who had been improperly excluded" (*Cannon*, 1979, p. 705).

In light of the Court's foray into issues of public policy perhaps, in his dissenting opinion Justice Powell chastened the majority for succumbing to the "temptation to lend its assistance to the furtherance of [a] remedial end deemed attractive" (*Cannon*, 1979, p. 749). Powell, however, was particularly critical the practice of implying private rights of action which, by allowing the courts to expand their own jurisdiction, he viewed as a disturbing violation of the constitutional separation of powers. "When Congress chooses not to provide a private civil remedy," he asserted, "Federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction" (*Cannon*, 1979, pp. 731-732).[15] In this instance, he continued, Title IX's legislative history made it clear that "Congress deemed the administrative enforcement mechanism it did create fully adequate to protect Title IX rights" (*Cannon*, 1979, p. 730).

The installation of the federal courts as the principle arbiters of Title IX, importantly, has tremendously accelerated the rate of policy development under the statute. A leading example is the Court's decision in *Franklin v. Gwinnett County* (1992), validating the use of compensatory damages to remedy individual harm arising from a Title IX violation.[16] Judicial cognizance of the athletic regulations, moreover, has rapidly evolved and solidified the details of those requirements (Heckman, 1994, p. 963).[17] The four cases now regarded as the "jewels" of Title IX athletic case law (*Cook v. Colgate University* [1993], *Cohen v. Brown University* [1992], *Favia v. Indiana University of Pennsylvania* [1992], and *Roberts v. Colorado State University* [1992]), for example, can be traced directly to the Court's liberalization of Title IX enforcement.

As there was scant case law construing the athletic regulations, in all but one of the cases noted above (*Cook*) the courts accorded considerable weight to OCR's Policy Interpretation and the agency's unpublished Investigator's Manual (1990). While these documents provided some clarification of the regulations' requirements, however, the experience of these courts shows that they raised as many questions as they answered.

Does, for example, the renewed emphasis on equalizing participation as opposed to ensuring equal access, comport with the goals of statute? Or more specifically, does a test in which compliance is assessed by reference to statistical proportionality or demonstrated progress towards that goal, conform Title IX's ban on preferential treatment and constitutional guarantees? In each case, deferring to OCR's interpretive authority, the courts have answered these questions in the affirmative and clarified other issues of practical importance[18], including whether the effective accommodation analysis is "severable" from the other major compliance areas for the purposes of concluding a Title IX violation (Heckman, 1994).

Of the cases construing OCR's three-pronged "effective accommodation" analysis, the most illustrative[19], exhaustive[20], and dispositive involved a class-action suit brought by female members of Brown University's volleyball and gymnastics teams after those programs, along with two men's teams, were demoted for budgetary reasons from varsity to club status in May of 1991.

In the course of upholding OCR's effective accommodation analysis, the *Cohen* courts (there were four) developed Title IX athletic policy by clarifying the three elements of the analysis, by deciding that the analysis itself is severable from the two other major compliance areas for the purposes of establishing a violation of Title IX, and by unraveling an important challenge to the analysis. One striking aspect of these accomplishments was the level of deference accorded by the courts to OCR's interpretation of the regulations. In dismissing Brown's contention that the Policy Interpretation "goes so far afield that it countervails the enabling legislation," for example, the appellate court held that it was a "plausible" interpretation of the regulation and noted that when the Civil Rights Restoration Act (1987) was enacted, Congress had the opportunity to disapprove of the Policy Interpretation and "chose instead to reaffirm its intent that Title IX's prohibition against sex discrimination be broadly construed" (*Cohen III*, 1995, p. 198).[21]

The question of severability, or whether a failing in any one of the Policy Interpretation's three major areas of compliance may constitute a Title IX violation, as the district court noted, was a decisive consideration because the claim against Brown was based solely on an alleged violation of the effective accommodation component of the Policy Interpretation (*Cohen I*, 1992).

In opposition to that finding, the University advanced the argument that the Policy Interpretation and the Investigator's Manual contain a "complex framework for assessing athletic programs as a whole" and that many more questions and factors would have to be addressed before proving a Title IX violation (*Cohen I*, 1992, p. 987).[22]

Finding both documents inconclusive and pointing to conflicting language in the Investigator's Manual providing in effect that investigations may be limited to less than all three of the major compliance areas, the courts ruled that because participation controls access to all other benefits of athletic programs the effective accommodation analysis could be severed from an overall determination of compliance.

> Equal opportunity to participate lies at the core of Title IX's purpose. Because the [effective accommodation analysis] delineates this heartland, we agree that the district courts that have so ruled and hold that, with regard to the effective accommodation of students' interests and abilities, an institution can violate Title IX even if it meets the "financial assistance" and "athletic equivalence" standards. In other words, an institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects. (*Cohen II*, 1993, p. 897)

Having concluded that effective accommodation was "the point of departure for evaluating compliance," the courts went on to apply the Policy Interpretation's three-pronged analysis to the facts presented, summarily noting that a thirteen point disparity between the percentage of women athletes and the percentage of women undergraduates at the University failed to satisfy the first test of "substantial proportionality" (*Cohen I*, 1992, p. 991).[23] As a matter of law, the appellate court noted, "proportionality" furnishes a "safe harbor" from Title IX liability, and institutions not wishing to engage in extensive compliance analysis "may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup" (*Cohen II*, 1993, pp. 897-98).

The second and third parts of the effective accommodation analysis, "a history and practice of continuing program expansion" and "full and effective accommodation," according to the appellate court, reflect "that there are circumstances under which, as a practical matter, something short of [] proportionality is a satisfactory proxy for gender balance" (*Cohen II*, 1993, p. 898). In applying the second test, however, the district court found that although Brown had significantly increased opportunities for female athletes in the 1970's, a ten-year hiatus failed to demonstrate a *continuing* practice of program expansion (*Cohen I*, 1992).[24]

The third test, the appellate court remarked, "sets a high standard" (*Cohen II*, 1993, p. 898). "[I]t demands not merely some accommodation, but 'full and effective accommodation.' If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test" (*Cohen II*, 1993, p. 898). In applying this final test the district Court found that the University's demotion of two women's teams in which "there is great interest and talent" was indicative of something less than full and effective accommodation and concluded that Brown was in violation of Title IX, ordering the University to submit a comprehensive plan for achieving compliance (*Cohen III*, 1995, pp. 211-212).

Brown, of course, resisted each of the courts findings on both legal and empirical grounds.[25] The most important of its arguments involved the charge that the third prong of the analysis requires an institution to accommodate every expression of student interest "to the fullest extent until the substantial proportionality of prong one is achieved," thus imposing "preferential or disparate treatment to members of one sex on account of an [statistical] imbalance" in contravention of both Title IX (§1681[b]) and the Equal Protection Clause (*Cohen IV*, 1996, pp. 174-175).

The response to Brown's argument was most fully developed in the First Circuit's second review of the case in 1996 (*Cohen IV*). There, the court emphatically stated that this "is not an affirmative action case" (*Cohen IV*, 1996, p. 169). With regard to the specific charge that the effective accommodation analysis mandates the use of gender-based preferences and quotas, the court held that because the analysis provides two ways to demonstrate compliance that are unrelated to proportionality, the analysis violates neither equal protection guarantees nor Title IX's own prohibition on preferential treatment (*Cohen IV*, 1996). "The question of substantial proportionality under the Policy Interpretation's three-part test," the court asserted, "is merely the starting point for analysis, rather than the conclusion; a rebuttable presumption rather than an inflexible requirement" (*Cohen IV*, 1996, p. 171).

In addition to the University, however, there were others who were not persuaded that the different elements of the effective accommodation analysis should be viewed in isolation for the purposes of analysis under Title IX's own ban on the use of preferences or equal protection doctrine, because a determination of compliance necessarily involves all three tests (*Cohen IV*, 1996). In his dissenting opinion, for example, the Chief Judge of the First Circuit stated that "[i]n my view it is the result of the test, and not the number of steps involved, that should determine if a quota system exists" (*Cohen IV*, 1996, p. 196).

While agreeing that "no aspect of the Title IX regime at issue...mandates gender-based preferences or quotas," Judge Torruella argued that taken together the three tests comprise "an affirmative action, quota-based scheme" (*Cohen IV*, 1996, p. 196).

> The majority claims that 'neither the Policy Interpretation nor the district court's interpretation of it mandates statistical balancing.' The logic of this position escapes me ... The first prong ... surely requires statistical balancing ... The second prong ... is essentially a test that requires the school to show that it is moving in the direction of satisfying the first prong. Establishing that a school is moving inexorably closer to satisfying a requirement that demands statistical balancing can only be done by demonstrating an improvement in the statistical balance ... Finally, the third prong ... goes farther than the straightforward quota test of prong one ... the unmet interests of the underrepresented sex must be completely accommodated before any of the interest of the overrepresented gender can be accommodated. (*Cohen IV*, 1996, p. 196)

A similar conclusion was reached in *Pederson v. Louisiana State University* (1996) where, on the belief that the interpretation of the effective accommodation analysis in *Cohen* and *Roberts* advanced the use of prohibited preferences and quotas, the Western Louisiana District Court refused to follow those decisions. In their acceptance of proportionality as an appropriate test of Title IX compliance, the court stated:

> [those cases] strongly rely on each other and on a stated administrative deference ... However, the jurisprudential emphasis on numerical "proportionality" is not found within the statute or the regulations; rather, it is inferred from language in the Policy Interpretation and ignores other language within the Policy Interpretation and the statute which argues against such an inference. (*Pederson*, 1996, pp. 911-912)

Moreover, insofar as statistical tests of compliance run counter to the statutory objective acknowledged by the Supreme Court in both *Cannon* and *Franklin* of protecting *individuals* from discrimination, and preferential treatment based on such tests is explicitly prohibited, the court concluded that the deference accorded in *Cohen* and *Roberts* to OCR's Policy Interpretation was misplaced (*Pederson*, 1996). Judicial deference to administrative interpretative discretion, the court observed, is not absolute since it is the inevitable role of the courts to "say what the law is" (*Pederson*, 1996 quoting *Stinson v. United States*, 1993).[26]

## Discussion

As Brown University discovered–to briefly recap the import of the past twenty-five years of policy development in this one area of regulated activity–Title IX athletic regulation is an animal with teeth. Without any other prerequisite, a private action may maintained on the basis of an institutions' failure to maintain statistical "proportionality", compensatory damages may be awarded to redress individual harm, and court-orders may be issued to expand offerings for women athletes, coercing a redistribution of resources within athletic departments.

Whatever view one takes of this regulatory machinery and its relationship to Title IX, however, it is abundantly clear that there was no organized effort to deliver colleges and universities into the hands of federal bureaucrats, no furtive plot to deprive them of their autonomy or academic freedom. Having said that, the parallels between the existing requirements and the broader (but unenacted) purposes of Title IX do lend themselves to a depiction of the agencies and courts struggling to cast off the statute's express and implied limitations in order to achieve a different vision of "equality", particularly with regard to athletics. The emphasis on statistical proportionality, in particular, can be seen as a reflection of the widely held belief that interest and ability follow opportunity.

## Threads of Explanation: Policy Conflicts

Much as Clune's model suggests, the decisions and events described above can be seen as manifestations of two distinct lines of disagreement, or policy conflicts, over the goals of Title IX first which were first encountered during the formation of the statute: "total versus qualified equality" and "equality versus autonomy".

### "Total" Versus "Qualified" Equality

This conflict was first evident in the attempt on the part of women's groups to emulate

federal policy regarding race discrimination in their constitutional litigation strategy, the ERA, and in the early stages of the legislative effort which led to the creation of Title IX itself. Each of those efforts advanced a "no exceptions" policy premised on the belief that sex, like race, is an immutable characteristic not effecting an individual's abilities, and therefore an inequitable basis for differential treatment.

By rejecting the proposal to regulate sex discrimination through a simple extension of Title VI of the Civil Rights Act (1964) and providing express exemptions for certain types of institutions (not found under Title VI), however, Congress tacitly rejected the use of race policy as a benchmark for Title IX protection. Instead, lawmakers chose to honor the distinctions between race and sex discrimination in constitutional law, diverting Title IX from the path of "total equality" onto a path of "qualified equality."

The second iteration of this conflict involved the struggle, prior to enactment, over exemption of admissions policies from Title IX coverage–correctly seen by women's groups as the lynchpin of Title IX protection insofar as admissions policies have a direct bearing on access to educational opportunities. Arguments advanced by higher education leaders and their congressional allies in this instance bore the implicit assumption that Title IX was a "qualified" statement of nondiscrimination policy contemplated to accommodate the legitimate needs of institutions; an assumption which Congress partially validated by exempting the admissions policies of the more insular and tradition-bound private institutions.

The third iteration surfaced in the form of attempts to exempt revenue-producing sports from the regulations, a move thought to be justified by redistributive nature of the statute and the economic realities of athletic programming. In refusing to exempt those programs, however, Congress declined the invitation to further qualify Title IX's protections and provided one illustration of the relative weights it accorded to the statutes' goals and competing institutional demands. Economic necessity (especially where it derives from artificially imposed financial constraints), lawmakers apparently concluded, is an insufficient basis for abrogating the goals of the statute.

The final (and perhaps, ongoing) iteration of the conflict over the total vs. qualified nature of Title IX protection concerns "causation" seen in the shifting standards of accountability for differences in male and female interest in athletic participation. The earliest indication of tensions in this area involved the inclusion in Title IX of a provision prohibiting the use of preferential treatment to correct "statistical imbalances" (§1681[b]); familiar features of affirmative action programs which seek, without assigning fault, to redress the effects of societal discrimination by ensuring access.

Notwithstanding that express limitation, the issue resurfaced in DHEW's first formulation of its athletic regulations which included the imposition of "affirmative efforts" to cultivate and then accommodate female interest in participation. Following a torrent of negative feedback, and faced with the prospect of congressional review of its regulations however, the agency recanted, and in its second formulation of the regulations limited the reach of "effective accommodation" to existing student interest and relegating the test to the status one of host of other considerations focused on the equitable distribution of the "material benefits" of athletic participation.

"Clarifying" the regulations five years later, however, OCR returned to the more aggressive approach, specifying that compliance with the effective accommodation component of the regulations would be assessed by reference to the "proportionality" of male and female participation in athletic programs with their respective rates of undergraduate enrollment and, failing that inquiry, demonstrations of either a history of program expansion for women or satisfaction of every female interest in participation.

As several courts later realized, the difference between ensuring equal opportunity and remedying the effects of societal discrimination under this "three-pronged" analysis is not an intuitive one. In *Cohen*, in particular, the courts expended a great deal of energy attempting to distinguish the analysis to avoid its condemnation under Title IX's ban on preferences and statistical balancing. The courts, moreover, succeeded in compounding the causation problem by holding that a failure of the effective accommodation analysis alone is sufficient to support a finding of noncompliance without, importantly, having to reach a determination of whether the institution's policies and practices created the disparity.

The difficulty of applying Title IX's requirements to athletic programs, to summarize, has led to the creation of regulatory framework which arguably shifts the responsibility for societal influences on women's interest in sports to colleges and universities.[27] Whatever its source, that result is obviously more congruent with the goals of affirmative action, perhaps the highest expression of "total equality," than with the qualified form of equality exhibited in Title IX.

Equality vs. Autonomy

Most of the competing demands encountered throughout Title IX implementation, of course, arose from the "right" of institutions to self-determination. Depending on the context, this alleged prerogative has been alternatively characterized as an essential element of academic freedom and as an expectation arising from Congress' longstanding, but informal policy of not interfering in college and university affairs.

The initial definition Title IX jurisdiction provides the earliest indication of the conflict between these claims to institutional autonomy and the broad social purposes underlying Title IX. In that instance, lawmakers rejected a Senate version of the statute extending coverage to institutions in receipt of federal assistance before, perhaps in recognition of its tradition of nonintervention, limiting coverage to recipient "programs" and "activities" (20 U.S.C. §1681). To reinforce this limitation, moreover, a provision was inserted stating that the termination of federal assistance shall be "limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found"; meaning, by direct inference, that only those programs in direct receipt of federal assistance could be penalized for noncompliance (20 U.S.C. §1682).

The second illustration of this conflict involves an event discussed previously; Congress' exemption of the admissions policies of private institutions. In that debate, conservative lawmakers asserted that the imposition of Title IX would invade the academic freedom of colleges and universities to determine their own educational policy, chiefly by dictating an "appropriate" ratio of men and women (Cong. Rec., 1971; 39,249). Opponents of the exemption, on the other

hand, responded that disguising gender bias as a component academic freedom not only did not make it legitimate, but disparaged women and nullified the concepts of social responsibility, taxpayer equity, and civil rights (Cong. Rec., 1971).

A third example is DHEW's interpretation of Title IX coverage in the regulations. A broad interpretation of the statute's jurisdiction, the agency obviously understood, would vastly expand its potential to combat discrimination. Veering sharply from a literal interpretation of the statute's scope to make Title IX coverage as comprehensive as possible, accordingly, DHEW showed itself more responsive to the broad purposes of the statute articulated in the its legislative history than to the technical expression of that purpose in the mandate. If the proposition was ever in doubt, an examination of the awkward legal reasoning used to justify its extension of coverage to "institutional" recipients of federal assistance imparts a definite sense of an agency attempting to "break out of the constraints of the cautious compromises contained in many implementation mandates" (Clune, 1983, p. 62).

When the jurisdiction issue was revisited in *Grove City* (1984), by contrast, although finding strong evidence of a congressional intent to make Title IX jurisdiction coextensive with the indirect receipt of federal student aid, in a highly conflicted opinion the Supreme Court refused to give effect to that finding–demonstrating an eagerness to accord greater weight to institutional concerns than to the broad social purposes it had recognized and acted upon in an a Title IX case just five years earlier (*Cannon*, 1979). Congress, of course, had the final word in this controversy when with the Civil Rights Restoration Act (1987) it affirmed the institutional form of coverage advanced in the regulations, once again realigning the statute's balance between equality and autonomy.

Finally, there are the decisions in *Cannon* (1979) and *Franklin* (1992) where the Supreme Court was seen liberally imputing intent to Congress to advance Title IX enforcement. By enabling private litigants to meaningfully enforce the statute, the Court removed an important limitation of the statute which had effectively sheltered institutions from decisive intervention.

## Final Observations

Although it the intention of the foregoing analyses was not to establish a discreet, causal connection between the policy conflicts encountered during the formation of the mandate and the direction of athletic policy development, those analyses do offer some general reinforcement of several of assertions put forward in Clune's political model of implementation. One of those assertions, to reiterate, is that because implementation is essentially a "submersion of policy in politics," objectives must be expected to change (Clune, 1983). In the immediate context nothing could be clearer. From a highly confined expression of nondiscrimination policy, Title IX policy currently embraces programs as economically insular as athletics, and is arguably less concerned with rectifying the discriminatory conduct of colleges and universities than societal attitudes about female participation in sport.

How all of that development came about, of course, is the question of greatest interest, and the one greatest difficulty. An additional ambition of this study, notwithstanding, has been to examine several of Clune's higher-order assertions relating to that question; that implementation

is a "recursive" process in which changes occurring in implementation typically involve the conflicts first encountered in the formation of the mandate, that implementation is a process in which developments are often initiated by the interaction of interested participants, and that legal decisionmaking in implementation is infused with public policy discourse (either explicit or implied).

On the first score, analysis in the preceding section revealed that Title IX policy development has revolved around at least two ongoing conflicts; total vs. qualified equality, and equality vs. autonomy. Any issue or event, of course, may be painted to look like another if the brush used is broad enough, but enough specific examples exist to confidently conclude that these conflicts have exerted a durable influence on Title IX development. The debate over proportionality culminated in *Cohen* for example, provides a tidy illustration of the struggle over Title IX's identity as either a remedial program or one limited to prohibiting the consideration of gender by colleges and universities first seen in efforts to emulate policies regarding race discrimination.

Whether the history and analysis produced here have shown Title IX implementation to be a politically interactive process is another matter of interpretation, but an intuitively more difficult one because much of the development that occurred emanated from a single source: DHEW and its successor, OCR. In the majority of instances DHEW and OCR rather than Congress or the courts, was the facilitator of change, as for example in the extension of Title IX coverage to the beneficiaries of federal assistance, and the invention of regulations and guidelines giving the program a more pronounced remedial focus.[28]

Although the agencies crowded the field, there are also concrete examples of the different elements of government responding to one another's actions in ways that have precipitated developments. Perhaps the most volatile of those interactions involved the "give and take" surrounding the definition of Title IX coverage, where DHEW's expansive interpretation of coverage prompted rumblings in Congress, followed by the displeasure of the Supreme Court, and ultimately the approval of a different body of legislators. A different but equally responsive pattern, moreover, is visible in the later stages of implementation where OCR and the courts engaged in a "give and give" relationship, ladling gravy onto to one another's efforts to make substantial proportionality the measure of compliance.

Judging from the "deconstruction" of several Title IX developments conducted in an earlier section of this paper, the third of Clune's assertions, that legal decisionmaking in implementation is infused with public policy discourse, seems supremely obvious. From a legal perspective, for example, the decisions of DHEW, whose actions were almost uniformly more consistent with a desire for the most comprehensive and remedial provisions than with the limitations delineated in the mandate, can only be described as "unconventional". Unconventional in the sense that its actions and explanations gravitated toward the least supportive authority, and in the sense that its sympathy for the underlying purposes of the statute was almost candid.

Further, although few court opinions are what they initially appear due to the inherent complexity of legal reasoning, it is possible to spot "activism" even when it emanates from an organization as legally accomplished as the Supreme Court. In the course of implying both a right of action and a damages remedy, for example, the Court's efforts to impute knowledge and

decisions to Congress impart an unmistakable sense of result-oriented jurisprudence. From a public policy standpoint on the other hand, those decisions make excellent sense.

Many of the decisions examined, in fact, were plainly "result-oriented" and legalistic detail seemed to be provided more in the way of an assertion of how the law might be developed to support a desired outcome than to demonstrate how the contemplated action actually squared with the mandate or regulations. The reasoning employed by the different courts in *Cohen* to uphold OCR's effective accommodation analysis and sever the analysis from the other aspects of the regulation is illustrative. There the courts rather summarily deferred to OCR's interpretative authority and then fiercely endeavored to distinguish the effective accommodation analysis in such a way that it could be rescued from Title IX's ban on preferences and statistical balancing.

A few things, to conclude, seem clear from a simple reading of Title IX: that it prohibits sex discrimination in those programs over which Congress has direct control (owing to the receipt of federal assistance); that it is a qualified ban on sex discrimination (as it includes important exemptions and limitations); that the use of preferences to correct statistical imbalances is forbidden; and that enforcement is to be affected by administrative agencies primarily through the termination of funds. If these very literal translations of the statute can be characterized as the "expectations" shared at the outset of the program, this study has shown that those expectations, depending on one's perspective, have either been exceeded or ignored.

Correspondingly, therefore, much of potential for the invasion of institutional prerogatives feared by institutions in the policy formation process, has been realized. Currently, for example, colleges and universities face much greater exposure to Title IX regulation than presaged by the compromises reached on the issues of coverage, enforcement and remedial obligations during the formation of the statute.

## Statutes, Regulations and Guidelines

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Policy Interpretation of Title IX and Intercollegiate Athletics, Federal Register, pp. 71,415-417 (1979)

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The Equal Protection Clause, U.S. Constitution, Fourteenth Amendment

Title VII of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq.

Title IX of the Educational Amendments of 1972, P. L. 92-318 *codified at* 20 U.S.C. §1681 et seq., *amending* 29 U.S.C. §§ 203(r)(I)(s)(4))

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*North Haven Board of Education v. Bell*, 102 S.Ct. 1912 (1982)

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*Stinson v. United States*, 508 U.S. 36, 45 (1993)

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[2] See *Brenden v. Independent School District* (1973); *O'Connor v. Board of Education* (1973); *Leffel v. Wisconsin Interscholastic Athletic Association* (1978); and *Hoover v. Mickeljohn* (1977).

[3] The 1969 Report of the Presidential Task Force on Women's Rights and Responsibilities, for example, stated:

> Equality for women is unalterably linked to many broader questions of social justice. Inequities within our society serve to restrict the contribution of both sexes ... What this Task Force recommends is a national commitment to basic changes that will bring women into the mainstream of American life. Such a commitment, we believe, is necessary to healthy psychological, social and economic growth of our society. The leader who makes possible a fairer and fuller contribution by women to the nation's destiny will reap *dividends of productivity measurable in billions of dollars* ... (p. 38, emphasis added)

[4] At the time laws and policies resulting in the differential treatment of men and women were sustained under equal protection analysis if they bore a reasonable relationship to some legitimate governmental objective. The "strict scrutiny" extended to racial classifications, by contrast, demanded that laws and policies be narrowly tailored to affect a *compelling* government interest.

[5] The Equal Rights Amendment provided that: "equality of right under the law shall not be denied or abridged by the United States or by any state on account of sex."

[6] Minority groups already covered by Title VI, moreover, were wary that an amendment banning sex discrimination under Title VI could give rise to a political backlash which could threaten their own protection.

[7] It was fortuitous for Title IX proponents therefore, that in 1972 a House-Senate Conference Committee substituted a provision from the Senate version of Title IX which, instead of exempting all admissions policies from coverage, exempted only private, undergraduate programs (Fischel & Pottker, 1977).

[8] Another important aspect of this interpretive exercise which helped furnish DHEW's "institutional" vision of Title IX coverage was the assertion that federal assistance could be terminated if the program in direct receipt of that assistance was either administered in a discriminatory manner or the funds were used

to support a discriminatory program within the same institution. (Fed. Reg., 1974, p. 22,228). This assertion of remedial authority would enable the agency to enforce the regulations by penalizing directly funded programs for discrimination found in programs theoretically benefitting from that assistance. Critics, however, were quick point out that this approach contravened the express intent of the statute's enforcement provision which provides:

> Compliance with any requirement adopted pursuant to this section may be effected by [] the termination of or refusal to grant or continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record ...but *such termination or refusal shall be limited to the particular political entity or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found* ... (20 U.S.C. §1682, emphasis added)

[9] Apart from an inconsistency with the express language of Title IX there are at least three additional contradictions of which DHEW was fully aware. First, prior to enactment Congress had specifically rejected a version of the statute advancing institutional coverage, choosing to more closely tailor the statute to the limits of its own power to condition appropriations (Cong. Rec., 1971). Second, the "maintenance of effort" requirements routinely attached to federal categorical aid (which assure that federal funds supplement rather than supplant state or local funds) essentially make it illegal for institutions to use those funds to support other programs (BYU L. R., 1976; Kuhn, 1976). And third, within the same ruling on which DHEW placed its sole reliance (*Finch*), the court went on to state that the agency could not affect compliance by threatening a termination of funds without demonstrating that the program in direct receipt of funds was itself discriminatory (*Finch*, 1969). Absent the power to enforce compliance, in other words, an extension of coverage to indirect beneficiaries would be meaningless.

Equally compromising detail surrounded DHEW's decision to include federal student financial aid within the definition of "assistance", including the remark prior to enactment by Title IX's Senate sponsor Birch Bayh that "[i]t is unquestionable in my judgement, that this would not be directed at specific assistance that was being received by individual students..." (Hearings on Title IX Regulations, 1975, p. 481). In the sole case cited by the agency in support of the inclusion of student aid, *Bob Jones University v. Johnson* (1974), moreover, the Fourth Circuit had specifically determined that neither Title VI's language nor its legislative history revealed an intent to exempt veterans' education benefits from coverage (1974, p. 604).

Further undermining the agency's position on these issues was uncertainty over the automatic application of precedents established under Title VI with regard to race discrimination, to sex discrimination under Title IX (BYU L. R., 1976). Although numerous references were made concerning the parallel nature of the two statutes prior to enactment, constitutional law differentiates treatment of race and sex classifications (Hearings on Title IX Regulations, 1975). A court as in *Bob Jones*, accordingly, would be justified in giving broader meaning to "federal assistance" under Title VI in order to "interdict constitutionally impermissible racial discrimination" than it would under Title IX whereas many sex-based classifications are constitutionally permissible (BYU L. R., 1976, p. 167). The unqualified application of Title VI precedent to the interpretation of Title IX, in this view, would have an unwarranted, expansive effect on Title IX doctrine.

[10] The use of separate men's and women's teams (an otherwise impermissible gender classification under Title IX) to ensure that women are not "effectively" excluded from participation by the differences lack of

size, experience or ability, for example, complicates the picture because they involve the duplication of a host of fixed costs such as coaching salaries, facilities and upkeep, in addition to increases in such operating expenses as travel and accommodation (Iowa L. R., 1975). The proposed regulations allowed institutions to sponsor separate teams so long as they provided equipment and supplies in a nondiscriminatory manner (Fed. Reg., 1974).

[11] It is important to note in this regard that the regulations explicitly reject equal aggregate expenditures on men's and women's teams as the test of compliance and instead simply obligate institutions to provide the funds "necessary" to ensure that the opportunities provided are of substantially similar quality (Fed. Reg., 1975; 21,143 §86.41[c]). These considerations were not lost on the NCAA which, in a 1974 letter writing campaign and in the 1975 congressional hearings on the regulations, continued its effort to exempt revenue-producing sports from coverage in order to preserve existing levels of expenditure on those highly visible programs. (Hearings on Title IX Regulations, 1975, p. 101) Although the interaction of the regulations' effective accommodation and separate team provisions continue to exert pressure on athletic departments to equitably distribute the "material benefits" of participation in athletic programs, these requirements are far less prescriptive than the wholesale redistribution of income suggested by the proposed regulations.

[12] Congress' "approval" actually came in the form of an inability to pass a joint resolution disapproving of the regulations. The resolution was put forward by lawmakers who deemed DHEW's interpretation of Title IX, particularly its interpretation of coverage, to be so aggressive as to be "ultra vires," or beyond the rulemaking authority of the agency (Hearings on Title IX Regulations, 1975; Kuhn, 1976).

[13] Another important aspect of this mechanism is the treatment of student interest assessments which the regulations left for institutions to "consider by a reasonable means it deems appropriate" (Fed. Reg., 1975, p. 24,135). Reminiscent of the "affirmative effort" requirements under the proposed regulations, the Policy Interpretation provides:

> Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided: [they] take into account the nationally increasing levels of women's interests and abilities ... do not disadvantage the members of an underrepresented sex ... take into account team performance ... [and] are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex. (Fed. Reg., 1979, p. 71,417 emphasis added)

[14] The Court cited *Bossier Parish School Board v. Lemon* (370 F.2d 847 [5th Cir. 1967]), adding that the case had been "repeatedly cited with approval and never questioned during the ensuing five years" (*Cannon*, 1979, pp. 697-698) Equally persuasive, in the Court's view, was the fact that Title IX was "enacted against a backdrop of three recently issued implied-cause-of-action decisions of this Court involving civil rights statutes with language similar to that in Title IX" (*Cannon*, 1979, p. 698 ftn 22). Citing *Sullivan v. Little Hunting Park* , (1969); *Allen v. State Board of Elections* (1969) and *Jones v. Alfred H. Meyer Co.* (1968).

[15] Only a single aspect of the Court's four-part analysis, Powell observed, dealt with legislative intent, which he viewed as the only legitimate basis for implying a right of action, while the other three he characterized as invitations to judicial lawmaking (*Cannon*, 1979) Powell's treatment of the three remaining *Cort* factors was couched less in the facts of *Cannon* than in his objections to the entire practice of implying rights of action (Loftis, 1989). On this basis, his dissent has been recognized as the "doctrinal foundation for the Court's [subsequent] retreat from the liberal implication doctrine" and as the "judicial birth of the New Erie doctrine" (i.e., the judicial policy of non-interference with the decisions committed by

the Constitution to the other branches of government) (Doernberg, 1990, p. 766; Loftis, 1989, p. 350).

Powell took particular exception to that aspect of the *Cort* analysis calling for a judicial determination of the consistency of a private right of action with the "underlying purposes" of the legislative scheme because it "permits a court to decide for itself what the goals of a scheme should be, and how those goals should be advanced" (*Cannon*, 1979, p. 741). Even if such invasions of the legislative prerogative could be construed as constitutional, he asserted, they should nevertheless be avoided because they encourage Congress to "shirk its constitutional obligation and leave ... the courts to decide" (Loftis, 1990).

[16] Following *Cannon*, courts grappled with the issue of with how to resolve the Title IX grievances with which they were dealing in increasing numbers. After a period of uncertainty and reliance on injunctive remedies–which often led to the dismissal of lawsuits brought by students who had graduated by the time appeals were taken–that question was answered by the Supreme Court in *Franklin* (1992). Building on the private cause of action inferred in *Cannon* (and imputing a generally agreeable intent to Congress based on its actions following that decision), *Franklin* affirmed the power of the Federal courts to fashion any appropriate remedy, including monetary damages, to vindicate Title IX violations.

[17] The number of decisions issued in six cases commenced in 1992, for example, exceeded the number of decision involving athletics rendered during the first 19 years of Title IX's existence (Heckman, 1994).

[18] Including whether men's and women's programs should be compared on a sport by sport basis, on a same-sport basis, or on a program-wide basis (i.e., all the men's and women's teams within an athletic department) and which party bears the burden of proof for each component of the three-pronged effective accommodation test.

[19] Cohen is most illustrative of the limits of the analysis because Brown University had made significant strides following the enactment of Title IX to increase and improve its athletic program for women and, at the time, had an equal number of men's and women's teams, and female athletic participation in excess of 38%, considerably greater than that of most other institutions (Evans, 1996).

[20] The case involved two trials at the district court level, one on a preliminary injunction and another "on the merits," two appeals, and a petition for review by the Supreme Court.

[21] Whether Brown's concept [of the effective accommodation analysis] might be thought more attractive, or whether we, if writing on a pristine page, would craft the regulation in a manner different than the agency, are not very important considerations. Because the agency's rendition stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation according to its tenor. (*Cohen II*, 1993, p. 899)

The court drew its authority for this position from *Chevron v. Natural Resources Defense Council* (1984) a case in which the Supreme Court stated that a "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold [it]" (*Chevron*, 1984, p. 843). Elsewhere the court noted:

> Although [OCR] is not a party to this appeal, we must accord its interpretation of Title IX appreciable deference. The degree of deference is particularly high in the Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX. (*Cohen II*, 1993, p. 895)

Ironically, the court traced the source of OCR's "explicit delegation" to none other than the 1974 Javits

Amendment to Title IX which was enacted to secure special treatment in the regulations for revenue-producing sports *in the event* that athletics were to be covered by the regulations (P.L. 93-380 [1974]).

[22] The Investigator's Manual states: "[t]here is no rule or number of disparities that when reached constitutes a violation. Generally, the determination is whether, in reviewing the program as a whole the disparities add up to a denial of equal opportunity to athletes of one sex" (OCR Investigator's Manual, 1990, p. 10).

[23] As a practical matter, the district court noted after remand, because satisfaction of the substantial proportionality test effectively terminates the entire analysis, the standard must be stringent enough to effectuate the purposes of Title IX: "[t]hus, substantial proportionality is properly found only where the institution's intercollegiate athletic program mirrors the student enrollment as closely as possible" (*Cohen III*, 1995, p. 202).

[24] Adopting the Tenth Circuit's reasoning in *Roberts* (1992), the district court added that Brown's reductions in its men's programs, which tended to bring the overall program closer to proportionality, could not be counted as efforts to expand its women's programs (*Cohen III*, 1995).

[25] In an attempt to show that women are less interested in participation, Brown presented evidence showing that women's participation in college varsity sports exceeds their participation in other college sports programs, such as club and intramural sports, and fell far short of the levels of participation by men in those activities. Over a four-year period, moreover, surveys of Brown applicants revealed that women were far less interested in playing competitive sports than men. (See Brief of Appellants, 1997)

[26] *Stinson* (1993) generally, held that no deference is owed to an agency interpretation that is inconsistent with a federal statute or regulation.

[27] Contrary to the wording of Title IX which does no more than prohibit discrimination "on the basis of sex," the [analysis] virtually eliminates the requirement of causation, i.e. that the reason for the disparity be sex discrimination ... the only defenses are that a college or university has a history and continuing practice of program expansion for female athletes or that female athletes have been fully accommodated in the athletic program. These "defenses," however, are in effect nothing more than a recognition that Title IX compliance will take time ... The polestar of a violation remains the fact of a statistical disparity, regardless of cause. Under this definition of discrimination, the issue is not whether the abilities and/or interests of male and female athletes are equally accommodated but whether each group gets its quota of the available varsity positions as measured by their percentage in the student body. (Brief of Sixty Colleges and Universities as Amici Curiae in Support of Petition, 1996)

[28] It is indicative of the agency's disposition towards the purposes of Title IX, moreover, that even when changing policy was not specifically within its control, it actively advocated the expansion of those goals; as in *Cannon* where the agency supplied the Court with its opinion that an implied right of action would neither conflict with Title IX's statutory enforcement mechanism nor interfere with its own efforts to effectuate the goals of the statute.

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